



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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October 3, 1973

Mr. Francis V. Fabrizio
Director of Federal Marketing
Royal Typewriter Company
1700 Wisconsin Avenue, NW.
Washington, DC. 20007

Dear Mr. Fabrizio:

This is in reply to letters dated March 14 and July 10, 1973, with enclosures, in which you requested an opinion as to "whether [Atomic Energy Commission] cost-plus contractors which purchase from Federal Supply Schedules must adhere to the Federal Property Management Regulations if the particular Schedule so stipulates."

You state that most Atomic Energy Commission (AEC) contractors buy the most expensive typewriter on the Federal Supply Schedule (FSS) without specific justification required by section 101-26.403-3 of the Federal Property Management Regulations (FPMR). In support of your argument that AEC cost-reimbursement contractors must comply with the justification provision of the FPMR you point out that:

AEC Procurement Regulation subpart 9-5.9 in chapter 9 of title 41 of the Code of Federal Regulations states that it is AEC policy that cost-type contractors should meet their requirements from GSA sources of supply if these sources are made available to them and managers of field offices may authorize them to purchase against FSS contracts in accordance with the requirements and procedures in FPR subpart 1-5.9;

Subpart 1-5.9 states that orders placed by Government contractors under FSS contracts shall be placed in accordance with the provisions of the applicable FSS; and

The applicable FSS used for procurement of typewriters is FSC group 74, part 1, office machines. Page 4 of the schedule issued June 20, 1973, states in section 6 on "Multiple Awards" that orders placed at other than the lowest delivered price must be justified in accordance with FPMR 41 CFR 101-26.403-2.

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While the rules of procurement and supply set forth in both the Federal Procurement Regulations (FPR) and the FPMR are promulgated by the Administrator, General Services Administration, pursuant to section 201 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 481, and are mandatory upon some executive agencies, they are not mandatory upon the AEC. See 41 CFR 9-59.001(b). As to agencies upon which the act is not mandatory, FPMR 101-26.403-2 states that those agencies are merely apprised of the advisability of fully justifying any orders placed with other than the contractor offering the lowest delivered price. Furthermore, AEC Procurement Regulation 9-5.9, which implements FPR sec. 1-5.9, does not impose the justification requirements of FPMR 101-26.403-3 on AEC cost-type contractors. Moreover, although the FPR and FPMR are mandatory on some executive agencies, they are not mandatory on any cost-type contractor.

In authorizing the use of FES contracts, an agency may expressly limit or condition such authorization as it deems necessary in the public interest (see FPR sec. 1-5.902(c)). However, the AEC's policy has been to apply only necessary Federal requirements to its cost-type contractors and, in so doing, it has not incorporated the FPMR justification requirement in its contracts or in authorizations to cost-type contractors.

In view of the foregoing, AEC cost-reimbursement contractors are not required either by contract or regulation to adhere to the cost-justification provision of the FPMR.

In response to your July 10, 1973, inquiry concerning your contract's maximum order limitation, your acceptance of an order for more than your maximum order limitation would be in technical violation of your contract. However, this would be a matter for consideration by the General Services Administration as part of its contract administration responsibility.

You have stated that, if the vendors are required to adhere to the maximum order limitation in the F89, you presume that the buyers who use the schedule must adhere to the terms concerning the placement of orders. Under special provision 1(a)(2), the seller agrees not to accept or fulfill any orders in violation of the maximum order limitation. The same provision warns that violation by the seller may result in a default termination of the contract. On the other hand, special provision 6 merely provides that "ordering agencies" are subject to the instruction at 41 CFR 101-26.408 that such "ordering agency" should be in a position to justify ordering other than the lowest priced article available. Aside from the question of whether a cost-type contractor is an "ordering agency," we find that the

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former provision imposes a definite obligation on the seller, while the latter, in contrast, merely establishes a standard which the buyer "should" be in a position to meet. Unlike the former, the latter provision does not affect the rights and obligations of the parties.

Sincerely yours,

Comptroller General
of the United States